Rihan v Ernst & Young Global Ltd. and Others

The Evolving Interface Between Tort Law and Employment Law: *Rihan v Ernst & Young Global Ltd*

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Kerr J

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Introduction

In its decision in *Rihan v Ernst & Young Global Ltd.* ("Rihan"),[1] the High Court in England addressed whether it ought to recognise two novel duties of care rooted in the English law of negligence in tort. The claimant was an employee and partner of Ernst & Young Middle East (Dubai Branch) ("EYME") based in Dubai. He was engaged in the provision of audit services for the clients of a number of different legal entities operating under the well-known "Ernst & Young" banner ("E&Y Entities"). One of those clients was a precious metals dealer, Kaloti Jewellery International DMCC ("Kaloti") operating in Dubai. In 2013, the claimant was instructed to provide an independent written view on the propriety and quality of Kaloti's business practices: this is a process often referred to as an "assurance audit". During the audit, the claimant developed a reasonable suspicion that Kaloti was party to money laundering, engaged in the deception of the Moroccan government, and informed his employer and the other E&Y Entities. Having informed the local regulatory body, the Dubai Metals and Commodities Centre ("DMCC") about the irregularities that he had identified and his suspicions, he claimed that DMCC applied extreme pressure on his employer and the E&Y Entities to conceal any adverse findings in its Kaloti assurance audit report. In consequence, the claimant felt that his concerns were dismissed by his employer and the E&Y Entities, who sought to collude with Kaloti and the DMCC in concealing the alleged fraud and money laundering breaches by ensuring that no negative findings were made public. As a result, the claimant felt that his career was compromised by EYME and the E&Y Entities and he fled to England with his family with the knowledge of his manager. EYME and the E&Y Entities went on to make life very difficult for him and he feared for his safety and that of his family if he were compelled to return to Dubai to work. His claim was that he should be compensated for the economic loss that he suffered as a result, and he based this on the two novel duties of care. In an extremely long judgment, Mr Justice Kerr in the High Court rejected the case for the existence of one of the two novel duties of care, but accepted the case for the other. He went on to find that there had been a breach of that duty, and made an order for damages in favour of the claimant, amounting to $10,843,941 and £117,950 respectively.

Relevant Factors in Recognising Proposed New Tortious Duties

It is trite law that the courts must not recognise any new tortious duty in negligence to protect a claimant against economic losses, unless they are persuaded that an incremental development in the law should

[1] [2020] EWHC 901.

be made by analogy with existing precedents.[2] Analogising by reference to existing decided cases in this way involves consideration of the tripartite approach derived from Lord Bridge's speech in the House of Lords decision of *Caparo Industries plc v Dickman*.[3] Famously, Lord Bridge's three-pronged test entails enquiring whether the economic losses claimed in the particular novel case are reasonably foreseeable, that a sufficient relationship of proximity has arisen between the claimant and the defendants and finally, that it is "fair, just and reasonable" to impose the duty of care on the defendants.[4] The justification for such a gradual and evolutionary dynamic is based on the need for coherence in the law of negligence. In this way, the systematic development of legal doctrine is less likely to be botched or mired in inconsistency.[5]

An additional factor worthy of consideration in addressing the case for the recognition of any original tortious duty of care emerges from an area of private law peripheral to the law of tort. This concerns the pivotal role played by the law governing the contract of employment. Of course, this will assume relevance where the proposed doctrinal development would impose an obligation on an employer in favour of an employee. Prior case law has illustrated how the specialist rules regulating the employment contract mediated via the implied contractual terms in law do not provide for any obligation on the employer to safeguard the economic or financial interests or well-being of its employees.[6] However, this is subject to three important exceptions, each of which share in common two things: first, they are rooted in the implied terms in law governing the contract of employment (and some of them have concurrent obligations in the law of negligence in tort, running alongside the contractual obligations); and secondly, they each harbour a concern for the post-employment economic interests of employees.

As off-shoots from the stem of the contractual implied term in law enjoining the employer to exercise reasonable care for the physical and psychiatric health of its employees ("Reasonable Care Implied Term"),[7] in the cases of *Scally v Southern Health and Social Services Board*[8] and *Spring v Guardian Assurance plc*,[9] the House of Lords accepted the proposition that employers may on occasion be subject to certain obligations in respect of the economic losses of their employees. In *Scally*, it was held that an implied contractual obligation ought to be imposed on an employer where there is an

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[2] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] 2 AC 736 at 744F-747H per Lord Reed.

[3] [1990] 2 AC 605. However, some commentators have argued that the decisions of the Supreme Court in *Robinson* and *Steel v NRAM Ltd.* [2018] UKSC 13, [2018] 1 WLR 1190 represent departures from the tripartite formula in *Caparo*, with a preference for an "assumption of responsibility" test derived from the classic case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465: see G. Dick, "A Reappraisal of Solicitors' Liabilities to Opposing Parties and the (Further) Retreat from *Caparo* – *Steel and Another v NRAM Ltd.*" (2019) 23 *Edinburgh Law Review* 247 and M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text and Materials*, 6th edn (2017) 446.

[4] [1990] 2 AC 605 at 617H-618B.

[5] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] 2 AC 736 at 747A per Lord Reed. For a much broader discussion about the relationship between the evolution of the common law and coherence, see Sir Philip Sales, "The Common Law: Context and Method" (2019) 135 *Law Quarterly Review* 47.

[6] *Crossley v Faithful & Gould Holdings Limited* [2004] EWCA Civ 293, [2004] IRLR 377, 383 per Dyson LJ. Any managerial duty of a general nature to protect the employee against economic losses can only be rooted in the law of negligence in tort: for an example, see *Lennon v Commissioner of Police of the Metropolis* [2004] EWCA Civ 130; [2004] 1 WLR 2594.

[7] Which is a well-established implied contractual duty of employers: see *Wilsons & Clyde Coal Co. Ltd v English* [1938] AC 57.

[8] [1992] 1 AC 294.

[9] [1995] 2 AC 296.

express contractual term of the employee's employment contract that confers a valuable right contingent on the employee taking certain action to secure the benefit. In such a case, the small print of the implied term prescribes that the employer must take reasonable steps to inform the employee of the existence of that express contractual term if the employee could not be expected to be aware of it unless it was brought to his attention by the employer. Seen from this angle, it is a fact-specific implied term in law, confined to a narrow range of circumstances. As for *Spring*, this prescribed that employers must exercise reasonable care in the preparation of a written reference to a potential new employer of an employee, which must not result in economic or financial losses to the employee.

However, the Reasonable Care Implied Term is not the only implied term in law that has been deployed as a basis for the exceptions to the general proposition that employers owe no tortious or contractual duty to safeguard the economic or financial interests of their employees. For example, in *Malik v BCCI*, the House of Lords held that an implied contractual obligation in law imposed on the employer not to conduct a corrupt or dishonest business could be derived from the broader implied term in law of the contract of employment that an employer must not destroy or severely undermine the employee's trust and confidence in the employment relationship.[10] And where such an implied obligation is breached, the employer must make good the employee's economic losses. Nevertheless, as noted in the recent decision of the UK Supreme Court in *James-Bowen v Commissioner of Police of the Metropolis*,[11] it should be stressed that even this open-textured implied term has its limits.[12] Here, having rejected the case for a tortious obligation that employers must prepare a defence to litigation in a manner protecting their employers from reputational and economic harm, the Supreme Court rejected the proposition that the implied term of mutual trust and confidence could give rise to a derivative obligation performing the same or a similar role. The justification for this proposition was that implied terms in law, such as the implied term of mutual trust and confidence, should not be permitted to advance and develop in a direction that would outflank the law of tort.[13]

The Proposed Two New Tortious Duties

In *Rihan*, the claimant relied on two novel duties of care in tort in respect of economic losses. The first was an obligation on the part of the employer to adopt reasonable steps to prevent him from sustaining loss of earnings as a result of his reasonably apprehended concerns for his safety and that of his family if he were compelled to return to Dubai ("general safety duty"). From this general safety duty could be carved certain derivative ancillary obligations. The first was a duty imposed on the employer to do what was reasonable to avoid or mitigate the risks to the claimant's safety in light of his objections to the Kaloti audit findings. The second duty provided that the employer was required to take reasonable steps to provide him with alternative work somewhere other than Dubai or to relocate him from Dubai.[14] The second duty of care contended for by the claimant was referred to in shorthand as the "audit duty of care". This entailed a duty imposed on the employer to take reasonable steps to protect the claimant from financial losses arising from its failure to undertake the Kaloti audit in a professional and ethical manner.[15]

[10] [1998] AC 20.
[11] [2018] UKSC 40, [2018] 1 W.L.R. 4021.
[12] For commentary, see D. Cabrelli, "Receding Confidence in Trust and Confidence?" (2020) 23 *Edinburgh Law Review* 411.
[13] See D. Cabrelli, "Receding Confidence in Trust and Confidence?" (2020) 23 *Edinburgh Law Review* 411, 413-415.
[14] [2020] EWHC 901 at paras 457 and 463.
[15] [2020] EWHC 901 at paras 458 and 464-466.

Mr Justice Kerr reached the conclusion that it would be "an illegitimate extension of the law" to accept the existence of the general safety duty of care. In this way, there is no valid legal proposition that an employer (such as EYME) owes a broad duty to its employees (such as the claimant) to safeguard them against pure economic loss incurred as a result of the needs of any of its employees to cease working in order to avoid a threat to their physical safety, failing which the employer is liable in damages in tort in respect of the relevant employee's career-ending losses.[16] In the view of the judge, applying the tripartite *Caparo* test, it would not be "fair, just and reasonable" to subject an employer to a tortious obligation of this kind insofar as it would transcend the conventional contractual Reasonable Care Implied Term.[17]

However, the judge's rejection of the general safety duty of care can be contrasted with his judgment concerning the audit duty of care. Having reached the conclusion that the duty of care proposed by the claimant was sufficiently novel, he then went on to analogize by reference to the salient facts of relevant decided cases, and applied the three-pronged approach in *Caparo*. On that basis, Mr Justice Kerr reached the view that it was appropriate to accept the audit duty of care contended for by the claimant. First, the judge agreed that it was reasonably foreseeable that the claimant would suffer loss as a result of an unethical and professional audit and that there was reasonable proximity between the claimant and EYME and the E&Y Entities in carrying out the Kaloti audit. Finally, Mr Justice Kerr also ruled that there were a number of justifications for the proposition that it was fair, just and reasonable to impose the audit duty of care on EYME and the E&Y Entities. First, the terms of the 2012 code of ethics issued by the International Federation of Accountants were taken as the established norms of ethical and professional behaviour in the conduct of assurance audits. As such, EYME and the E&Y Entities were held to such standards in undertaking the Kaloti audit, but had fallen well short of expectations. Secondly, Mr Justice Kerr was of the view that if the Reasonable Care Implied Term is taken as the starting point for the analysis, it is "not [such] a huge [conceptual] leap" from such a launch-pad to recognise the audit duty of care.[18] He could see no reason why the professional and moral integrity of an employee or quasi-employee should not be protected against economic losses in the form of future employment opportunities, in the sense of the provision of an ethically safe working environment, without any professional misconduct.[19] To that extent, the audit duty of care accepted in *Rihan* can be added to the limited category of exceptions recognised in *Scally*, *Spring* and *Malik*.

Analysis

From the perspective of doctrine, the decision of Mr Justice Kerr in Rihan is notable for a number of reasons. First, in adopting the three-pronged approach in *Caparo*, Mr Justice Kerr cast doubt on the utility of the *Hedley Byrne*-derived "assumption of responsibility" test as a standalone foundation for the establishment of a duty of care in negligence.[20] And that was the case, notwithstanding the reaffirmation of that test by Lord Bingham in the House of Lords in *Customs and Excise Commissioners v Barclays Bank Plc*[21] and by the Supreme Court in both *Robinson* and *Steel*. As such, the ongoing tussle for superiority between this test and the alternative tripartite *Caparo* approach continues unabated. Perhaps one way to decide on when it is apposite to use either of those tests would be to adopt

[16] [2020] EWHC 901 at paras 476 and 478.
[17] Of course, this seems to overlook the existence of the three exceptions addressed above that oblige employers to consider the post-employment economic interests of their employees.
[18] [2020] EWHC 901 at para 616.
[19] [2020] EWHC 901 at paras 616 and 620-621.
[20] [2020] EWHC 901 at para 517.
[21] [2006] UKHL 28, [2007] 1 AC 181.

the approach of Mr Justice Kerr in *Rihan*. Here, the "assumption of responsibility" analysis was confined to a special paradigm class of cases where a party had supplied advice or information as a service to another in the absence of a contractual nexus between the two and there was reasonable reliance on those statements.[22] In cases where advice or information is not provided, Mr Justice Kerr was of the view that it was more appropriate to adopt the unvarnished tripartite *Caparo* formula. A second point of interest lies in the extent to which many of the variables considered to be relevant where a novel duty of care is proposed (identified by analogy with similar decided cases on the duty of care) and that would operate to dismiss the case for the existence of the audit duty of care were found to be inoperative on the basis of the facts in *Rihan*. For example, the general proposition that the boundaries of the common law should not be extended where Parliament has occupied the terrain were considered inapplicable.[23] It was held that the specialist unfair dismissal jurisdiction in Part X of the Employment Rights Act 1996 ("ERA") designed to provide statutory protection to employees did not apply to the claimant, as he ordinarily worked outside Great Britain.[24] Likewise, for the same reason, the statutory whistleblowing claim in Part IVA of the ERA available to employees was also inaccessible to the claimant and did not cut across the proposed extension of the common law.[25] As such, there was no overlap between the common law and statute and the former was free to evolve unhindered. Secondly, the point made in *James-Bowen* that the existence of a conflict of interest (where the interests of the claimant and the defendants clash) is an important factor weighing against the recognition of a duty of care did not arise here.[26] To the extent that the audit duty of care contended for by the claimant entailed the imposition of an obligation on the employer to take reasonable steps to protect him from financial losses arising from a failure to carry out the Kaloti audit professionally and ethically, the application of this rule would necessitate that the defendants argue that they owed a duty to Kaloti or the DMCC to carry out the assurance audit unprofessionally or in an unethical manner. For obvious reasons, Mr Justice Kerr found this illogical and so dismissed the relevance of this rule in the case in hand. Finally, as stated earlier, it is a noteworthy judgment to the extent that it demonstrates the point that the general rule against recovery for economic or financial losses stemming from reputational injury is subject to a greater number of exceptions than hitherto understood (for example, those in *Scally*, *Spring* and *Malik*). This underscores a broader point that there is no such thing as a closed list of exceptional cases where economic losses are inaccessible in tort or under the implied contractual terms in law governing employment contracts.

Concluding Thoughts

Rihan can be thought of as an addition to the limited class of exceptional cases in tort such as *Scally*, *Spring* and *Malik* that enable an employee or quasi-employee to be protected against economic or financial losses arising subsequent to the termination of their employment contract. However, from the perspective of the law regulating the employment contract, the adjudicative techniques adopted in *Rihan* to the appropriate interaction between the common law and statute is pregnant with great potential.[27]

[22] [2020] EWHC 901 at paras 514-516.
[23] *Johnson v Unisys Ltd.* [2003] 1 AC 518.
[24] [2020] EWHC 901 at paras 576 and 618-620.
[25] [2020] EWHC 901 at paras 628-634.
[26] [2020] EWHC 901 at paras 609-610.
[27] For a broader discussion, see J. Beatson, 'Has the Common Law a Future?' (1997) 56(2) *Cambridge Law Journal* 291, 301; M. Freedland, *The Personal Employment Contract* (Oxford, OUP, 2003) 10–12, 155–6, 189, and 339–44; M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, OUP, 2011) 101; A. Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232; A. Bogg, "Common Law

The judgment in *Rihan* seems to suggest that where statute has not occupied the field, the common law should be permitted to expand. In the important employment law decision in *Johnson v Unisys*, the House of Lords refused to broaden the scope of the common law to protect all employees where the employer had exercised its power to dismiss an employee in a manner that breached the implied term of mutual trust and confidence. The justification for this decision was that a relevant employment protection statute (the ERA) regulated dismissals and thus functioned to preclude any such development. In this way, the common law could not evolve to protect *any* employees or workers. But this "all or nothing" approach in *Johnson v Unisys* overlooked the fact that the dismissal protections in the ERA are subject to various eligibility requirements and specifically exclude employees working in certain occupations or economic sectors.[28] As such, what is altogether different, and intriguing, about the approach to the interface between statute and common law in *Rihan* lies in how it permits a fact-based and casuistic extension of the common law where statute fails to bite. For example, because Rihan was ordinarily working outside Great Britain, the High Court judge recognised that the ERA did not apply and on that basis, was prepared to recognise the tortious duty of care. But this was not the reasoning adopted by the House of Lords in *Johnson*. In the final analysis, to the extent that it might be used as a precedent in future cases to enable the common law implied contractual term of mutual trust and confidence to be developed in a manner protective of those employees or quasi-employees (such as atypical gig economy or zero-hours contract workers) who are not covered by the statutory unfair dismissal protections contained in Part X of the ERA, *Rihan*'s legacy may be significant and extend beyond the law of tort. One way in which that might be achieved would be if *Rihan* was used to permit the common law to flourish outside the boundaries of the statutory unfair dismissal legislation to impose a set of modest substantive and procedural constraints on the employer's power to terminate the employment contract with reasonable notice. But, of course, this analysis strays from the primary importance of *Rihan* for the law of tort, and as such, the contractual angle is an issue for further research in a future paper.

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and Statute in the Law of Employment" (2016) 69 Current Legal Problems 67; A. C. L. Davies, 'The Relationship Between the Contract of Employment and Statute' in M. Freedland et al. (eds), *The Contract of Employment* (Oxford, OUP, 2016) 75–80; and A. Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge, CUP, 2018) 45-87.

[28] For example, the individual must be an employee, have at least two years' service with the employer and must not be employed as a share fisherman or by the police, or ordinarily work outside Great Britain: see sections 94, 108, 199 and 200 of the ERA.